

Before the
Administrative Hearing Commission
State of Missouri



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|----------------------------------|---|----------------|
| MISSOURI REAL ESTATE COMMISSION, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | No. 13-1499 RE |
| |) | |
| JOSEPH RAYMOND FULGENZI, |) | |
| |) | |
| Respondent. |) | |

ORDER

We grant the Missouri Real Estate Commission's ("the MREC") motion for summary decision in part. Joseph Raymond Fulgenzi is subject to discipline because he pled guilty to a crime both reasonably related to his profession and an essential element of which is dishonesty, he lied about his guilty plea on his renewal application, and he lacks good moral character.

Procedure

On August 21, 2013, the MREC filed a complaint seeking to discipline Fulgenzi. On September 4, 2013, Fulgenzi was served with a copy of the complaint and our notice of complaint/notice of hearing by personal service. On October 15, 2013, Fulgenzi filed an answer. On December 9, 2013, the MREC filed a motion for summary decision. Regulation 1 CSR 15-3.446(6) provides that we may decide this case without a hearing if the MREC establishes facts that Fulgenzi does not dispute and entitle the MREC to a favorable decision.

We gave Fulgenzi until December 24, 2013, to respond to the motion, but he did not respond. Therefore, the following facts are undisputed.

Findings of Fact

1. Fulgenzi is licensed by the MREC as a real estate salesperson. His license was current at all relevant times except for the period between September 30, 2012 and January 8, 2013, when it had lapsed for failure to renew. Fulgenzi's license is not currently active because his relationship with his broker ended on April 1, 2013, and he has not transferred his license to another broker.

2. On August 1, 2012, Fulgenzi pled guilty in the United States District Court for the Western District of Missouri, Western Division ("the Court") to one count of Attempt to Evade or Defeat Tax ("tax evasion") under 26 U.S.C. § 7201.

3. The count reads as follows:

That on or [about] November 10, 2008, in the Western District of Missouri, Joseph R. Fulgenzi, then a resident of Kansas City, Missouri, did willfully attempt to evade and defeat the payment of a large part of the income tax due and owing by him to the United States of America for the calendar years 1998, 1999, 2000, 2001, 2002, 2003, and 2004, in the amount of at least \$80,941 by concealing and attempting to conceal from the Internal Revenue Service the nature and extent of his assets and the location thereof. All in violation of Title 26 United States Code Section 7201.1.^[1]

4. Fulgenzi committed the conduct as alleged in the count.

5. On December 29, 2012, Fulgenzi completed and signed an Application to Renew Salesperson License for the period from October 1, 2012 to September 30, 2014 ("renewal application").

6. On the renewal application, Fulgenzi marked "no" to the following question ("the criminal history question"):

¹ Exhibit A to the motion.

Have you been finally adjudicated and found guilty, or entered a plea of guilty or nolo contendere, in a criminal prosecution under the laws of this or any other state or of the United States whether or not sentence was imposed, including suspended imposition of sentence, suspended execution of sentence and misdemeanor charges that you have not previously disclosed to this Commission? If yes complete information below. Attach additional sheet if needed.^{2]}

7. The renewal application requested the date of the plea, nature of the offense, court location or case number on the renewal application. Fulgenzi did not provide these.

8. Fulgenzi had not previously disclosed his guilty plea to the MREC.

9. The MREC issued a renewed license to Fulgenzi based on the information that Fulgenzi provided in the renewal application, including his answer to the criminal history question.

10. On March 21, 2013, the Court sentenced Fulgenzi to 46 months of imprisonment, to be followed by three years' supervised release. The court also ordered Fulgenzi to pay restitution of \$402,223.75 and an assessment of \$100.00.

Conclusions of Law

We have jurisdiction to hear this complaint.³ The MREC has the burden of proving that Fulgenzi has committed an act for which the law allows discipline.⁴ The MREC argues that there is cause for discipline under § 339.100:

2. The [MREC] may cause a complaint to be filed with the administrative hearing commission as provided by the provisions of chapter 621 against any person or entity licensed under this chapter or any licensee who has failed to renew or has surrendered his or her individual or entity license for any one or any combination of the following acts:

² Exhibit B1 to the motion.

³ Section 621.045. Statutory references, unless otherwise noted, are to the 2012 Supplement to the Revised Statutes of Missouri.

⁴ *Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

(10) Obtaining a certificate or registration of authority, permit or license for himself or herself or anyone else by false or fraudulent representation, fraud or deceit;

(16) Committing any act which would otherwise be grounds for the [MREC] to refuse to issue a license under section 339.040;

(18) Been finally adjudicated and found guilty, or entered a plea of guilty or nolo contendere, in a criminal prosecution under the laws of this state or any other state or of the United States, for any offense reasonably related to the qualifications, functions or duties of any profession licensed or regulated under this chapter, for any offense an essential element of which is fraud, dishonesty or an act of violence, or for any offense involving moral turpitude, whether or not sentence is imposed;

(19) Any other conduct which constitutes untrustworthy, improper or fraudulent business dealings, demonstrates bad faith or incompetence, misconduct, or gross negligence;

(25) Making any material misstatement, misrepresentation, or omission with regard to any application for licensure or license renewal. As used in this section, “**material**” means important information about which the [MREC] should be informed and which may influence a licensing decision[.]

Section 339.040.1 sets forth the qualifications for licensure. Applicants must prove they:

- (1) Are persons of good moral character; and
- (2) Bear a good reputation for honesty, integrity, and fair dealing; and
- (3) Are competent to transact the business of a broker or salesperson in such a manner as to safeguard the interest of the public.

I. False or Fraudulent Representation/Material
Misstatement – Subdivisions (10) and (25)

False is defined as:

1 : not genuine . . . 2 a : intentionally untrue . . . b : adjusted or
made so as to deceive . . . c : intended or tending to mislead . . . 7 a
: based on mistaken ideas[.⁵]

Fraud is an intentional perversion of truth to induce another, in reliance on it, to part with some valuable thing belonging to him.⁶

Fulgenzi did not respond to the motion for summary decision, but in his answer, he stated he had been told that he could change his plea any time before he was sentenced and that he filled out the renewal application before he was sentenced. But the criminal history question asked about a guilty plea, and the status quo at the time he filled out the renewal application and answered the question was that he had entered a guilty plea. We find that Fulgenzi provided a false and fraudulent representation in order to obtain his license renewal.

“Material” is defined in the statute. Misrepresentation is a falsehood or untruth made with the intent and purpose of deceit.⁷ Fulgenzi’s guilty plea to tax evasion was important information that might have influenced the licensing decision. It was a material misrepresentation.

There is cause for discipline under § 339.100.2(10) and (25).

II. Guilty Plea – Subdivision (18)

Fulgenzi pled guilty to tax evasion under Section 26 U.S.C.A. § 7201:

Any person who willfully attempts in any manner to evade or
defeat any tax imposed by this title or the payment thereof shall, in
addition to other penalties provided by law, be guilty of a felony
and, upon conviction thereof, shall be fined not more than

⁵ MERIAM-WEBSTER’S COLLEGIATE DICTIONARY 451 (11th ed. 2004).

⁶ *State ex rel. Williams v. Purl*, 128 S.W. 196, 201 (Mo. 1910).

⁷ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 794 (11th ed. 2004).

\$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

The guilty plea itself, without regard to the underlying conduct, is sufficient to find discipline under § 339.100.2(18) if we find the criminal offense (1) is reasonably related to the qualifications, functions or duties of a real estate professional, (2) has an essential element of fraud, dishonesty or an act of violence, or (3) involves moral turpitude.

A. Reasonably Related

Reasonable relation is a low threshold. To relate is to have a logical connection.⁸ The MREC argues that tax evasion is reasonably related to the duties of a real estate salesperson because the duties involve financial dealings. The failure to pay legally owed taxes reflects on the ability to enter into other financial transactions in business. There is cause for discipline under § 339.100.2(18).

B. Essential Element

An essential element is one that must be proven for a conviction in every case.⁹ The MREC argues that dishonesty is an essential element of tax evasion. Dishonesty is a lack of integrity or a disposition to defraud or deceive.¹⁰ 26 U.S.C. § 7201 requires that a taxpayer “willfully” attempt to evade or defeat any tax or the payment thereof. As the term is applied for purposes of the statute, “willfully” connotes a voluntary, intentional violation of a known legal duty.¹¹ While the Supreme Court has held that neither fraud nor deceit is an element of tax

⁸ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1050 (11th ed. 2004).

⁹ *State ex rel. Atkins v. Missouri Bd. of Accountancy*, 351 S.W.2d 483, 485 (Mo. App., K.C.D. 1961).

¹⁰ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 359 (11th ed. 2004).

¹¹ *Cheek v. United States*, 498 U.S. 192, 201-02 (1991); *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

evasion under § 7201,¹² a *willful* attempt to evade, defeat, or pay a tax connotes a lack of integrity.¹³ Therefore, there is cause for discipline under § 339.100.2(18).

C. Moral Turpitude

Moral turpitude is:

an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowman or to society in general, contrary to the accepted and customary rule of right and duty between man and man; everything “done contrary to justice, honesty, modesty, and good morals.”¹⁴

In *Brehe v. Missouri Dep’t of Elementary and Secondary Education*,¹⁵ a case that involved discipline of a teacher’s certificate under § 168.071 for committing a crime involving moral turpitude, the court referred to three classifications of crimes:¹⁶

- (1) crimes that necessarily involve moral turpitude, such as frauds (Category 1 crimes);
- (2) crimes “so obviously petty that conviction carries no suggestion of moral turpitude,” such as illegal parking (Category 2 crimes); and
- (3) crimes that “may be saturated with moral turpitude,” yet do not involve it necessarily, such as willful failure to pay income tax or refusal to answer questions before a congressional committee (Category 3 crimes).

The court stated that Category 3 crimes require consideration of “the related factual circumstances” of the offense to determine whether moral turpitude is involved.¹⁷

¹² *Kawashima v. Holder*, 132 S. Ct. 1166, 1174 (2012).

¹³ “Integrity” is defined as “a firm adherence to a code of esp. moral or artistic values.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 650 (11th ed. 2004). Fulgenzi’s willful evasion of taxes meets this standard.

¹⁴ *In re Frick*, 694 S.W.2d 473, 479 (Mo. banc 1985) (quoting *In re Wallace*, 19 S.W.2d 625 (Mo. banc 1929)).

¹⁵ 213 S.W.3d 720 (Mo. App., W.D. 2007).

¹⁶ *Id.* at 725 (quoting *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844, 852 (9th Cir. 1954)).

¹⁷ *Brehe*, 213 S.W.3d at 725.

Tax evasion is a Category 3 crime, and we have no evidence of the factual circumstances beyond what appears in the court records. We do not find this a crime involving moral turpitude at this time. The MREC may present evidence of “related factual circumstances” that would allow us to do so.

III. Grounds for Refusal – Subdivision (16)

A conviction and imposed sentence resulting from a guilty plea collaterally estops the issue of whether the person committed the criminal offense.¹⁸ We find that, by committing the criminal offense of tax evasion, Fulgenzi committed an act that would be grounds for denial of a license under § 399.100.2(16). Good moral character is honesty, fairness, and respect for the law and the rights of others.¹⁹ By failing to meet his legal obligation to pay his taxes, Fulgenzi showed a lack of respect for the law and the rights of others. His lack of good moral character is grounds to discipline his real estate license.

IV. Other Conduct – Subdivision (19)

The MREC argues that Fulgenzi is subject to discipline under § 339.100.2(19) for “any other conduct which constitutes untrustworthy, improper or fraudulent business dealings or demonstrates bad faith or gross incompetence[.]” The adjective “other” means “not the same : DIFFERENT, any [other] man would have done better[.]”²⁰ Therefore, subdivision (19) refers to conduct different than referred to in the remaining subdivisions of the statute. We have found that the conduct at issue is cause for discipline under § 339.100.2(10), (16), (18), and (25). There is no “other” conduct charged by the MREC in its complaint. Therefore, we find no cause for discipline under § 339.100.2(19).

¹⁸ *Carr v. Holt*, 134 S.W.3d 647, 649-50 (Mo. App., E.D. 2004) (citing *James v. Paul*, 49 S.W.3d 678, 682-83 (Mo. banc 2001)).

¹⁹ *Hernandez v. State Bd. of Regis’n for Healing Arts*, 936 S.W.2d 894, 899 n.1 (Mo. App., W.D. 1997).

²⁰ WEBSTER’S THIRD INTERNATIONAL DICTIONARY 1598 (unabr. 1986).

Summary

We grant the MREC's motion for summary decision in part. Fulgenzi is subject to discipline under § 339.100.2(10). He is subject to discipline under § 339.100.2(18) because he pled guilty to a criminal offense both reasonably related to the real estate profession and an essential element of which is dishonesty, and under § 339.100.2(16) because his lack of good moral character is grounds to deny him a license.

Fulgenzi is not subject to discipline under § 339.100(19).

We deny the motion for summary decision in part, because we lack sufficient evidence of the relevant factual circumstances of Fulgenzi's criminal offense to determine that he committed a crime involving moral turpitude. The MREC shall inform us by February 7, 2014, if it wishes to present such evidence at the hearing currently scheduled for February 25, 2014.

SO ORDERED on January 28, 2014.

\s\ Sreenivasa Rao Dandamudi
SREENIVASA RAO DANDAMUDI
Commissioner